MOTION FILED
OCT 31 1996

(3)

No. 96-517

In The
Supreme Court of the United States
October Term, 1996

WILLIAM R. FRY, ANTHONY J. MARRA, SIDNEY MISHKIN, THOMAS J. DWYER, KATHLEEN B. DWYER, PROGRESSIVE UNITED CORPORATION, and MERIDIAN STRATEGIC INVESTMENTS, L.P., both individually and as class representatives,

Petitioners,

v.

UAL CORPORATION, a Delaware corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF HARVEY L. HARRIS FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

HARVEY L. HARRIS, ESQ.
(Counsel of Record)
HARVEY L. HARRIS, P.C.
One Northfield Plaza
Suite 100
Northfield, Illinois 60093
(847) 446-1477

Attorneys for *Amicus Curiae*

6 pp

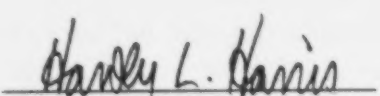
MOTION OF HARVEY L. HARRIS FOR LEAVE TO FILE THE ATTACHED *AMICUS CURIAE* BRIEF

Amicus Curiae, Harvey L. Harris, is an attorney who has practiced law in the Seventh Circuit for more than eighteen years and is engaged in civil litigation. I am familiar with the issues raised by the request for summary reversal in the Petition for Certiorari and seek leave to submit the attached brief as a true friend of the court with no interest whatsoever in the outcome or the subject matter of this litigation.

I sought the consent of the Petitioners and Respondent to file this brief. While Petitioners consented to the filing, Respondent refused to consent. Respondent gave no specific reasons for refusing to consent to this filing.

As an attorney practicing in this Circuit, I have long been aware of the general perception that certain judges in this Circuit decide cases without proper regard for the law and facts of cases before them. This disturbing perception transcends any particular case or fact situation. The attached *amicus curiae* brief therefore views the issues raised in the Petition for Certiorari from a broader perspective than either of the litigants.

Amicus curiae therefore requests leave to file the attached brief.



HARVEY L. HARRIS, ESQ.
(Counsel of Record)
HARVEY L. HARRIS, P.C.
One Northfield Plaza
Suite 100
Northfield, Illinois 60093
(847) 446-1477

BRIEF OF *AMICUS CURIAE* HARVEY L. HARRIS IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

Amicus Curiae hereby adopts the statements set forth in the above motion as his statement of interest.

ARGUMENT

There is a widespread belief among lawyers of high integrity and ability practicing in the Seventh Circuit that, despite his many contributions, Chief Judge Posner does not feel that he is bound to decide the rights of the parties before him based on the applicable law, including controlling Supreme Court precedent, or on the evidence in the record and that he is able to lead other members of the Seventh Circuit to join him in decisions which reflect this approach. This view is widely held by practitioners with whom your *Amicus Curiae* has spoken. This problem has also been noted in scholarly writings and in the publications of legal organizations reviewing the work of the Seventh Circuit.

For example, in A. Kurland, *Foreword: The Seventh Circuit as a Criminal Court: The Role of a Federal Appellate Court in the Nineties*, 67 Chi-Kent L Rev. 3 (1991), the author's review of Seventh Circuit cases showed that "Judge Posner and Judge Easterbrook are quite willing to . . . go several steps beyond existing Supreme Court precedent." *Id.* at 14. And the author further described as "somewhat comical" a Seventh Circuit opinion saying that the Seventh Circuit felt itself bound by Supreme Court precedent until it

was overruled. *Id.* at 16. The author further referred to an article published in a Chicago newspaper quoting University of Chicago Law Professor Albert Alschuler as saying that "'[i]t does seem to be that Posner and Easterbrook are ignoring the fact that there's a Supreme Court out there." *Id.* at 14, n. 59.

The Chicago Council of Lawyers, a public interest bar association which has been publishing judicial evaluations since 1970, in its *Directory of State and Federal Judges In Chicago*, May 1995 Edition,[1] confirmed that "Chief Judge Posner feels less constrained by precedent, history and the proper limits on appellate judging than, in the Council's view, he should" and that "at times [Judge Posner] refuses to accept existing Circuit or Supreme Court precedent as controlling the outcome of a case." *Id.* at 321-322. The Council also noted the other area of widespread complaint among Seventh Circuit practitioners saying that "the fact that many lawyers of high integrity and ability strongly believe Chief Judge Posner does not pay sufficient attention to the facts suggests that this is an area of important concern." *Id.* at 325-326.[2]

---

[1] Portions of this directory were reprinted from 43 DePaul L. Rev. 673 (1994).

[2] The Council's evaluation involved a painstaking review of each judge's opinions and extensive interviews with attorneys who appear frequently before the Court, former Seventh Circuit law clerks and others familiar with the Court's business. The Council also reviewed Judge Posner's own writings describing his judicial philosophy as well as scholarly commentary discussing his opinions. The Council met with each active Seventh Circuit judge to obtain their comments. *Directory of State and Federal Judges In Chicago*, May 1995 Edition, at iv-v.

The obligation for a court to decide cases based on the law and the evidence is fundamental to our legal system. A refusal to do so is a form of lawlessness far more serious because it involves those charged with the law's enforcement. It deprives our legal system of respect and, in the final analysis, the rule of law must be based not on power but on respect.

Petitioners' contention here is that the Seventh Circuit refused to apply or even to discuss the controlling Supreme Court authority and that it made factual determinations in support of summary judgment by relying on personal conjecture outside the record and ignoring the flatly contradictory testimony of adverse witnesses. These kinds of complaints are all too familiar in this Circuit.

CONCLUSION

A legal system which decides people's rights not by the law and the evidence but by the predilections of the judge is no legal system at all. Your *Amicus Curiae* believes that the administration of justice in this Circuit would be furthered if the Supreme Court would seriously consider this case and, if petitioners' complaints are warranted, grant summary

---

These problems have also been noted in unsuccessful dissents. *See e.g., Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 282-83 (7th Cir. 1992) (Cudahy, J., dissenting) ("[t]he majority's review of the facts here is so lopsided as to be almost droll--if it were not serious business").

reversal and remand for further consideration in light of the Supreme Court authority and the evidence in the record.

RESPECTFULLY SUBMITTED

HARVEY L. HARRIS, ESQ.
(Counsel of Record)
HARVEY L. HARRIS, P.C.
One Northfield Plaza
Suite 100
Northfield, Illinois 60093
(847) 446-1477